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In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, ET AL.,
PETITIONERS

v.

PLAYERS INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

Whether 18 U.S.C. 1304, which prohibits the broadcasting of advertisements for "any lottery, gift enterprise, or similar scheme," violates the First Amendment as applied to broadcast advertisements for legal casino gambling.

PARTIES TO THE PROCEEDINGS BELOW

The petitioners here, who were the defendants in the district court and are the appellants in the court of appeals, are the United States of America and the Federal Communications Commission. The respondents here, who were the plaintiffs in the district court and are the appellees in the court of appeals, are Players International, Inc.; Players Lake Charles, LLC; Players Star Partnership; Southern Illinois Riverboat/Casino Cruises, Inc.; National Association of Broadcasters; Texas Association of Broadcasters; New Jersey Broadcasters Association; Mississippi Association of Broadcasters; Louisiana Association of Broadcasters; Missouri Broadcasters Association; West Virginia Broadcasters Association; Massachusetts Broadcasters Association, Inc.; New Hampshire Association of Broadcasters, Inc.; Illinois Broadcasters Association; Spring Broadcasting Limited Partnership (formerly known as H&D Broadcasting Limited Partnership); and Raritan Valley Broadcasting Co., Inc.

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OPINIONS BELOW

The court of appeals has not yet issued an opinion. The opinion of the district court (App., *infra*, 1a-25a) is reported at 988 F. Supp. 497.

JURISDICTION

The appeals in C.A. No. 98-5127 (3d Cir.) and C.A. No. 98-5242 (3d. Cir.) were docketed in the court of appeals on February 26, 1998, and May 19, 1998, respectively. The jurisdiction of this Court is invoked, prior to judgment in the court of appeals, under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

STATUTORY PROVISION INVOLVED

18 U.S.C. 1304 provides:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined under this title or imprisoned not more than one year, or both. Each day's broadcasting shall constitute a separate offense.

STATEMENT

This case involves a challenge to the constitutionality of 18 U.S.C. 1304, which prohibits the broadcasting of "any advertisement of * * * any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance." In the proceedings below, the District Court for the District of New Jersey held that Section 1304 violates the First Amendment as applied to the broadcasting of advertisements for lawful casino gambling in States that permit such gambling. The government has appealed the judgment of the district court to the Court of Appeals for the Third Circuit. During the pendency of that appeal, private parties in *Greater New Orleans Broadcasting Association, Inc.* v. *United States*, No. 98-387, filed a petition for a writ of certiorari presenting the same First Amendment question that is pending

before the Third Circuit. The government is filing this petition for certiorari before judgment because of the pending petition in *Greater New Orleans*.

1. Section 1304 is part of a body of federal restrictions on lotteries and related gambling activities that has been maintained by Congress for more than 100 years. In 1868, Congress made it a crime to mail "any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196. After briefly limiting that mailing prohibition to illegal lotteries, Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302, Congress extended the ban in 1876 to all lotteries and similar gambling enterprises, including ones chartered by state legislatures, Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90. In 1890, Congress extended the mailing prohibition from "letters or circulars" to newspapers, closing a major loophole in the 1876 statute. Anti-Lottery Act, ch. 908, § 1, 26 Stat. 465. Five years later, Congress moved to eliminate interstate lotteries altogether by prohibiting the transportation of lottery tickets in interstate or foreign commerce. Act of Mar. 2, 1895, ch. 191, 28 Stat. 963. With exceptions noted below, those restrictions on interstate lotteries and related gambling activities remain in effect today. See generally 18 U.S.C. 1301 *et seq.*; 39 U.S.C. 3001(a), 3005; *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 421-423 (1993).

In *Champion* v. *Ames*, 188 U.S. 321 (1903), this Court held that the 1895 prohibition on interstate transportation of lottery tickets was within the power of Congress under the Commerce Clause. In the course of its opinion, the Court summarized the policies behind the federal lottery statutes. The Court explained that lotteries were regarded by Congress as a "~~widespread~~

a "widespread pestilence." 188 U.S. at 356. Congress "shared the views" that a lottery is uniquely pernicious because it "enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; [and] it plunders the ignorant and simple." *Id.* at 355, 356. In addition, States that had themselves banned lotteries required congressional assistance to deal with the interstate aspects of lotteries. Congress "said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce." *Id.* at 357. Thus, Congress intervened both to protect the public against the intrinsic ills associated with lotteries and to reinforce the efforts of anti-lottery States.

In the Communications Act of 1934, Congress added Section 1304 to this body of gambling restrictions. See Pub. L. No. 417, ch. 652, § 316, 48 Stat. 1088. The Federal Communications Commission (FCC) subsequently adopted a parallel regulation, which is now codified as 47 C.F.R. 73.1211. Although Section 1304 is a criminal statute, it has not been enforced through criminal proceedings. Instead, the FCC has pursued administrative remedies for violations of its parallel regulation. The FCC can impose a variety of administrative sanctions on licensees for violations of the regulation, including monetary forfeitures and license revocation. See 47 U.S.C. 312(a)(6), 503(b)(1)(D) and 503(b)(2)(A).

By its terms, Section 1304 is not confined to lotteries, but rather applies to broadcast advertisements for any "lottery, gift enterprise, or similar scheme." In *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 290 (1954), this Court construed "lottery, gift enterprise, or similar scheme" to include any undertaking involving: "(1) the distribution

of prizes; (2) according to chance; (3) for a consideration." See also *Horner* v. *United States*, 147 U.S. 449, 458 (1893) ("[T]he term *lottery* embraces all schemes for the distribution of prizes by chance * * * and includes various forms of gambling."). In light of *American Broadcasting*, the FCC has consistently treated casino gambling as a form of "lottery, gift enterprise, or similar scheme," because virtually all casino gambling involves "the distribution of prizes" (money), "according to chance," "for a consideration" (the gambler's wager). As indicated below, Congress has likewise understood casino gambling to be covered by Section 1304, and that understanding has not been disputed in this case.

2. In the years since the enactment of Section 1304, Congress has amended the federal gambling statutes on several occasions to permit broadcast advertising of specific types of gambling activities. However, Congress has repeatedly chosen not to lift the ban on broadcast advertising of commercial casino gambling.

a. During the late 1960s and early 1970s, a growing number of States began to conduct lotteries to raise money for government programs. Beginning in 1975, Congress amended the federal gambling statutes to take account of the growth of state-run lotteries. See 18 U.S.C. 1307(a)(1) and(b)(1). Congress sought to strike a balance, allowing the promotion of state-run lotteries within lottery States while simultaneously continuing to discourage participation by residents of non-lottery States. See S. Rep. No. 1404, 93d Cong., 2d Sess. 2 (1974) (Senate Lottery Report); H.R. Rep. No. 1517, 93d Cong., 2d Sess. 5 (1974) (House Lottery Report). To accomplish this, Congress allowed the broadcasting of advertisements for a state-run lottery "by a radio or television station licensed to a location in

that State or a State which conducts such a lottery." 18 U.S.C. 1307(a)(1)(B). Congress also made corresponding changes in the restrictions on lottery-related mail and interstate commerce. 18 U.S.C. 1307(a)(1)(A) and (b)(1).

Although Congress relaxed the restrictions on broadcast advertising of state-run lotteries, it left the federal restrictions on private gambling activities undisturbed. Congress remained "familiar with the kinds of abuses that existed one hundred years ago in the operation of private lottery schemes." Senate Lottery Report, *supra*, at 2. It was willing to relax restrictions on state-run lotteries because "[s]tate lotteries as operated * * * today represent an entirely different situation." *Ibid.* For example, Congress heard testimony that the procedures used by state-run lotteries "operate to hinder organized criminal groups from infiltrating or stealing from these state lotteries." House Lottery Report, *supra*, at 6.

Although the 1975 legislation permits broadcast advertising of state-run lotteries in States that conduct lotteries, advertising of state-run lotteries remains unlawful in States that do not conduct lotteries. In *Edge Broadcasting*, *supra*, a broadcaster in a non-lottery State challenged the constitutionality of that restriction under the First Amendment. In rejecting that challenge, this Court held that the prohibition of broadcast advertising of state-run lotteries in non-lottery States satisfies the requirements of the First Amendment. 509 U.S. at 425.

b. Like state governments, Indian tribes have come to rely on gambling as a source of public revenue. See 25 U.S.C. 2701(1); S. Rep. No. 446, 100th Cong., 2d Sess. 2-3 (1988). Congress "views tribal gaming as governmental gaming, the purpose of which is to raise tribal

revenues for member services." *Id.* at 12. To accommodate the governmental interests of the nation's Indian tribes, while simultaneously responding to concerns about potential criminal infiltration and other problems, Congress in 1988 enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. 2701 *et seq.*).

As part of Congress's effort to "promot[e] tribal economic development" (25 U.S.C. 2702(1)), the IGRA exempts "any gaming conducted by an Indian tribe pursuant to this [Act]" from Section 1304's restrictions on broadcast advertising. 25 U.S.C. 2720. At the same time, the IGRA substantially tightens government oversight of Indian gambling, by subjecting certain types of gambling to direct federal regulation and subjecting other types of gambling to regulatory compacts between Indian tribes and States. 25 U.S.C. 2704-2706, 2710-2713. In addition, the IGRA ensures that the revenues of Indian gambling, unlike those of private casino gambling, are used solely for public purposes. The IGRA requires that net revenues be devoted exclusively to funding tribal governments, local government agencies, and charitable organizations; to promoting tribal economic development; or to providing for the welfare of the tribes and their members. 25 U.S.C. 2710(b)(2)(B), (d)(1)(A)(ii) and (d)(2)(A).

c. In 1988, Congress also enacted the Charity Games Advertising Clarification Act, Pub. L. No. 100-625, 102 Stat. 3205 (codified principally at 18 U.S.C. 1307(a)). The Act removes federal advertising restrictions on legal lotteries run by charity groups and by "governmental organization[s]," other than the state-run lotteries already covered by the 1975 legislation. See 18 U.S.C. 1307(a)(2)(A). The Act also lifts advertising restrictions on "occasional and ancillary" promotional

lotteries, such as a car dealership drawing for a new car. 18 U.S.C. 1307(a)(2)(B); see 134 Cong. Rec. 31,075 (1988) (Senate Judiciary Committee Report) (giving examples of promotional lotteries).

As originally proposed, the 1988 legislation would have removed advertising restrictions on all gambling allowed under state law, including commercial casino gambling. See 134 Cong. Rec. 12,278-12,280 (1988). However, the House of Representatives adopted an amendment that specifically excluded casino gambling from the bill. *Id.* at 12,280-12,282. The Senate subsequently redrafted the bill to accomplish the same result. *Id.* at 31,073-31,076. In its report on the bill, the Senate Judiciary Committee stated that "no provision of [the bill] is intended to change current law as it applies to interstate advertising of professional gambling businesses." *Id.* at 31,075.

3. a. Respondents include the National Association of Broadcasters, a number of state broadcasting associations, two New Jersey radio stations, and several corporations that operate gambling casinos. They brought this action against the United States and the FCC in October 1996.

Respondents contend that the application of Section 1304 to broadcast advertising for lawful commercial casino gambling in States that permit such gambling violates the First Amendment under the commercial speech doctrine of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), and its progeny. Under *Central Hudson*, a legislative restriction on commercial speech is subject to a four-part inquiry: (1) whether the speech concerns lawful activity and is not misleading; and if so, (2) whether the asserted governmental interest for the provision is substantial; and if so, (3) whether the

provision directly advances the asserted interest; and if so, (4) whether it is no more extensive than is necessary to serve that interest. *Id.* at 566.

Respondents and the government filed cross-motions for summary judgment regarding the constitutionality of Section 1304 under the First Amendment. The government identified two distinct interests that are served by Section 1304: first, an interest in minimizing the social and economic costs associated with casino gambling and other kinds of "lottery, gift enterprise, or similar scheme[s]" by reducing public participation in such activities, and second, an interest in assisting States that prohibit or otherwise restrict gambling activities. The government contended that Section 1304 directly advances those interests by reducing public demand for gambling and by excluding broadcast gambling advertising from non-gambling States. The government further contended that the statutory exceptions to Section 1304 do not affect its constitutionality and that the statute is not impermissibly restrictive.

In support of its motion, the government submitted declarations and academic studies detailing the economic and social problems, such as compulsive gambling and organized crime, associated with casino gambling and other gambling activities. The government also presented evidence that broadcast advertising is a particularly effective way of stimulating gambling activity and that restrictions on broadcast advertising materially reduce participation in gambling, thereby reducing gambling's attendant social and economic costs. The government presented data showing that private commercial casinos account for a large share of the national gambling market and that, for that and other reasons, the statutory exceptions to Section 1304

do not render the statute ineffectual. Finally, the government presented evidence regarding the superiority of advertising restrictions over other forms of government regulation as a means of curtailing compulsive gambling. See C.A. App. 47-441. Respondents did not submit contrary evidence on any of those issues.

b. On December 19, 1997, the district court issued an opinion and order entering summary judgment in favor of respondents and declaring that Section 1304 and the corresponding FCC regulation violate respondents' First Amendment rights. App., *infra*, 1a-27a.

The district court reviewed the constitutionality of Section 1304 under the First Amendment standards of *Central Hudson* and subsequent commercial speech decisions. See App., *infra*, 8a-9a. The court appears to have concluded, albeit with some reservations, that the government interests underlying Section 1304 are substantial ones. See *id.* at 9a-18a. The court nonetheless held that Section 1304 is unconstitutional under *Central Hudson* because, in the court's view, the statute does not directly advance the government's interests and is more restrictive than necessary to serve those interests. See *id.* at 18a-25a. Notwithstanding the evidence submitted by the government regarding the social and economic costs of casino gambling and the effects of broadcast advertising, the district court found that the government had not shown that Section 1304 significantly reduces gambling's social costs. *Id.* at 23a-24a. The court also reasoned that the statutory exceptions to Section 1304 "subvert[]" the ability of the statute to "protect[] society from the social problems promoted through gaming activities." *Id.* at 23a-24a. Finally, the court stated that Section 1304 "is [not] the only means by which the government can reduce the feared social ills" and that Section 1304 "is more extensive than

necessary to serve the government's interest in protecting non-casino states from the broadcasting of casino advertisements." *Id.* at 24a.

Following the district court's declaration that Section 1304 is unconstitutional, the FCC issued a public notice that it would suspend enforcement of its regulation in the District of New Jersey *pendente lite* but would not suspend enforcement elsewhere. The plaintiffs responded by filing a motion for entry of a nationwide injunction. On April 1, 1998, the district court denied the motion for injunctive relief. App., *infra*, 28a-34a. Its order stated that the court's original decision declaring Section 1304 unconstitutional "is final and ripe for appeal to the Third Circuit." *Id.* at 34a.

The government filed a timely notice of appeal from the district court's December 1997 order on February 13, 1998. App., *infra*, 35a-36a. After the district court's denial of injunctive relief, the government filed a second notice of appeal on April 24, 1998, covering both orders. App., *infra*, 37a-38a. The two appeals were docketed by the Third Circuit as C.A. No. 98-5127 and C.A. No. 98-5242, respectively. The appeals have been fully briefed and are currently awaiting oral argument in the Third Circuit.[1]

4. On July 30, 1998, during the course of appellate briefing in this case, the Court of Appeals for the Fifth Circuit issued its decision in *Greater New Orleans*. 149 F.3d 334. The Fifth Circuit held in *Greater New Orleans* that the application of Section 1304 to broadcast advertising of lawful casino gambling does not

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[1] Respondents have filed a motion to stay further appellate proceedings pending this Court's disposition of the petition for certiorari in *Greater New Orleans*, *supra*. On October 5, 1998, the Third Circuit referred that motion to the merits panel.

violate the First Amendment. The Fifth Circuit's decision conflicts with both the district court's decision in this case and *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998), in which the Ninth Circuit sustained an identical First Amendment challenge to Section 1304.

On September 2, 1998, the plaintiffs in *Greater New Orleans* filed a petition for a writ of certiorari (No. 98-387), asking the Court to resolve the conflict among the courts of appeals regarding the constitutionality of Section 1304. That petition is now pending before the Court. The government is filing a brief in opposition to the petition in *Greater New Orleans* in conjunction with the filing of this petition.

ARGUMENT

The constitutionality of 18 U.S.C. 1304 is an issue of substantial public importance that has divided two courts of appeals and is now pending before a third. The importance of the issue and the need to resolve the existing division among the courts of appeals make review by this Court appropriate. However, the recently filed petition in No. 98-387, *Greater New Orleans Broadcasting Ass'n* v. *United States*, does not provide a suitable vehicle for the Court to take up the constitutional question, because the record in *Greater New Orleans* was prepared prior to *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996), and other recent decisions of this Court that have modified the contours of the commercial speech doctrine. The record in this case, in contrast, was prepared after *44 Liquormart* and is responsive to the constitutional reasoning reflected in the Court's most recent commercial speech decisions. In our view, the most prudent course of action for this Court would be to await the decision of the Third

Circuit in this case before taking up the constitutionality of Section 1304. However, if the Court wishes to proceed at this time, the Court should issue a writ of certiorari before judgment in this case to ensure that the Court is able to address the constitutional issue in the context of a more illuminating record than that in *Greater New Orleans*.

1. The district court in this case, like the Ninth Circuit in *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (1997), cert. denied, 118 U.S. 1050 (1998), and in contrast to the Fifth Circuit in *Greater New Orleans*, held that Section 1304 does not satisfy the First Amendment requirements of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), and its progeny. That holding is incorrect. The government interests underlying Section 1304 are substantial, the statute directly advances those interests, and the statute is not impermissibly restrictive.[2]

a. As noted above, Section 1304 serves two related but distinct government interests. The first is an interest in minimizing the social and economic costs associated with casino gambling and other kinds of "lottery, gift enterprise, or similar scheme[s]" by reducing public demand for such gambling activities. When Congress enacted the original federal anti-lottery stat-

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[2] In applying the *Central Hudson* framework to Section 1304, the Court should not lose sight of the fact that the statute limits only radio and television broadcasts. This Court's cases "have permitted more intrusive regulation of broadcast speakers than of speakers in other media," *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 637 (1994) (citing *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) and *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943)), although the Court has not opined on the implications of the principles underlying those cases for the *Central Hudson* analysis.

utes, it acted on a judgment that lotteries and similar gambling enterprises impose pervasive social and economic costs on society. See *Champion* v. *Ames*, 188 U.S. 321, 356 (1903) (*Lottery Case*) (Congress concluded that "the widespread pestilence of lotteries * * * infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."). Section 1304 and related federal gambling statutes (see pp. 3-5, *supra*) reflect Congress's continuing judgment that gambling contributes to a host of social and economic problems.

In the proceedings before the district court, the government submitted declarations and other materials documenting the social and economic costs of gambling activities, particularly commercial casino gambling. See C.A. App. 47-97, 111-376, 379-402, 438-441. The record shows that many of the costs associated with gambling activities involve compulsive gambling, a recognized psychological disorder that is referred to clinically as "pathological gambling." *Id.* at 181-184. From 3 million to 10 million Americans are believed to be compulsive gamblers. *Id.* at 183, 185, 192. Estimates of the economic costs of compulsive gambling amount to tens of billions of dollars annually, and the social costs of compulsive gambling—such as spousal and child abuse, divorce, depression, and even suicide—are equally serious. *Id.* at 193, 208-210, 272-274, 292, 309, 310, 321, 335-337, 341, 359-366, 388, 397-398. Because gambling casinos offer "continuous play" gambling devices such as slot machines, they are particularly conducive to compulsive gambling behavior, and compulsive gamblers account for a disproportionate share of casino revenues. *Id.* at 249, 257, 270, 383, 392-393, 399-400.

In addition to providing both a stimulus and an outlet for compulsive gambling, casino gambling has traditionally been a lure for organized crime and other kinds of criminal activity. See, *e.g.*, Congressional Statement of Findings and Purpose preceding the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-923, 18 U.S.C. 1961 note; Message from the President of the United States Relative to the Fight Against Organized Crime, H.R. Doc. No. 105, 91st Cong., 1st Sess. 5-6 (1969); S. Rep. No. 617, 91st Cong., 1st Sess. 71 (1969); President's Comm'n on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* 2 (1967); President's Commission on Organized Crime, *Interim Report to the President and the Attorney General—The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering* 51 (1984); *Brown* v. *Hotel & Restaurant Employees Local 54*, 468 U.S. 491, 494-495 (1984). The record presented by the government in this case extensively documents the relationship between criminal activity and gambling, particularly casino gambling. See C.A. App. 47-97, 106-179, 385-386, 389-391.

In *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), this Court had "no difficulty" in concluding that the governmental interest in minimizing the social and economic costs of gambling, particularly casino gambling, is a substantial one. See *id.* at 341. Although the Court has subsequently held that the use of commercial speech restrictions to further that interest requires closer scrutiny than *Posadas* employed, see p. 20, *infra*, the Court has never cast any doubt on *Posadas*'s assessment of the underlying government interest in reducing participation in casino gambling, and the record in this case amply confirms the continuing force of that assessment.

The other government interest underlying Section 1304 is an interest in assisting States that prohibit or otherwise restrict gambling activities. Broadcast advertising is inherently interstate in nature, see, *e.g.*, *Fisher's Blend Station, Inc.* v. *State Tax Commission*, 297 U.S. 650, 655 (1936), and States lack both the legal and the practical ability to exclude broadcast advertising originating outside their borders. Federal intervention is therefore required if non-gambling States are to be able to shield their residents from solicitations broadcast in neighboring States that allow gambling.

Nearly a century ago, in the *Lottery Case*, this Court endorsed Congress's use of its powers under the Commerce Clause to prevent "the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, [from being] overthrown or disregarded by the agency of interstate commerce." 188 U.S. at 357. Section 1304 represents a continuation of that effort. The federal government's interest in assisting anti-gambling States is no less substantial than its independent interest in reducing the social and economic costs of casino gambling and similar gambling activities.

b. Section 1304 directly advances both of the foregoing government interests. It furthers the government's interest in minimizing the social and economic costs of gambling activities by depriving commercial gambling casinos of one of the most potent means for stimulating public demand and participation. And it furthers the government's interest in assisting States that prohibit or restrict gambling by shielding them from broadcast advertising originating in adjacent or nearby States that permit such activities.

This Court has long recognized that promotional advertising directly increases public demand for adver-

tised products and services. In *Central Hudson* itself, "the Court recognized * * * that there was 'an immediate connection between advertising and demand for electricity.'" *44 Liquormart*, 517 U.S. at 500 (quoting *Central Hudson*, 447 U.S. at 569). And in *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993), the Court specifically concurred with Congress's "commonsense judgment" regarding the link between broadcast lottery advertising and lottery participation. As the Court explained there, "[i]f there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced." *Id.* at 434. Indeed, the connection between advertising and demand is the raison d'être of the advertising industry.

The district court understood *44 Liquormart* as having rejected the Court's past reliance on the immediate connection between promotional advertising and demand. App., *infra*, 19a. *44 Liquormart*, however, involved a different question: the use of restrictions on *price* advertising to curtail demand. In *44 Liquormart*, Rhode Island contended that restricting retail price advertising would reduce price competition; that reduced price competition would eventually lead to higher prices; and that higher prices would lead to lower demand. 517 U.S. at 504-505. Justice Stevens and three other Justices concluded that this indirect sequence of causal links was not sufficient, in the absence of "any evidentiary support whatsoever," to establish that the advertising ban materially reduced liquor consumption. *Id.* at 505-506 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.). However, neither Justice Stevens's opinion nor any of the other opinions in *44 Liquormart* questions the Court's re-

liance on the "direct connection" between promotional advertising and demand in *Central Hudson* and *Edge*, and none of the opinions suggests that an evidentiary showing is required to confirm that connection.

In any event, the evidentiary record in this case does confirm that restrictions on promotional advertising directly advance the government's interest in reducing public demand. Experts in gambling research and compulsive gambling testified by declaration that promotional advertising increases participation in gambling activities and compulsive gambling. C.A. App. 381, 400. They also testified that broadcast advertisements are a uniquely potent means of stimulating gambling activity because, *inter alia*, they "affect multiple senses and are extremely pervasive." *Id.* at 381, 391, 400. That testimony is consistent with this Court's recognition that broadcasting is "a uniquely pervasive presence in the lives of all Americans," one that "confronts the citizen, not only in public, but also in the privacy of the home." *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748 (1978). The record also contains evidence from the experience of state lotteries indicating that curtailing advertising results in a significant corresponding reduction in gambling activity. C.A. App. 382-383. The record thus supports the common sense conclusion that, by prohibiting commercial casinos from promoting their gambling activities over the airwaves, Section 1304 advances the government's interest in reducing the social costs associated with gambling activities.

c. The district court in this case and the Ninth Circuit in *Valley Broadcasting* also concluded that the exceptions to Section 1304 (see pp. 5-8, *supra*) prevent the statute from directly advancing the government's interests. That conclusion, however, cannot be reconciled with this Court's decision in *Edge*. In *Edge*,

this Court rejected a First Amendment challenge to the very statute at issue in this case, brought by a North Carolina radio station that wished to broadcast advertisements for the Virginia state lottery. The radio station argued, *inter alia*, that the statute was ineffective because it permitted lottery advertisements to be broadcast in lottery States, thereby exposing residents of adjoining non-lottery States to lottery advertising. This Court rejected the station's claim, holding that "the government may be said to advance its purpose by *substantially reducing* lottery advertising, even where it is not wholly eradicated." 509 U.S. at 434 (emphasis added).

The Court's reasoning in *Edge* applies with equal force here. The record in this case shows that commercial casino gambling accounts for 40 percent of all gross gambling revenues in the United States—$18.0 billion in gross revenues out of a total of $44.4 billion for all forms of gambling in 1995. C.A. App. 378. In comparison, state lotteries account for approximately a third of gross gambling revenues, Indian gambling accounts for less than 10 percent, and charitable gambling accounts for less than 5 percent. *Ibid.* By closing the airwaves to gambling advertising by commercial casinos that account for 40 percent of all gambling in the United States, Section 1304 "substantially reduce[s]" gambling advertising.

Moreover, commercial casino gambling is more likely to lead to adverse social costs than the kinds of gambling covered by the statutory exceptions to Section 1304. As noted above, the record below shows that casino gambling, and particularly slot machines, are associated with a higher incidence of compulsive gambling than other forms of gambling. C.A. App. 392. In addition, although Indian casinos may offer the same

kinds of gambling activities as non-Indian commercial casinos, the vast majority of Indian lands are located in relatively remote and sparsely populated areas, and many regions of Indian land have no casino gambling at all. *Id.* at 406-407. Private commercial casinos are far more likely to be situated within or near major urban centers, such as New Orleans and Las Vegas, so that broadcast advertising for private casinos would reach a large audience that could readily act on advertised inducements to gamble. Thus, unlike the statute struck down by this Court in *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), Section 1304 is not a statute with exceptions that "ensure[] that the * * * ban will fail to achieve [its] end." *Id.* at 489.

d. The final inquiry under *Central Hudson* is whether Section 1304 is "more extensive than is necessary" to serve the government's interests. In *44 Liquormart*, a majority of the Court appears to have held that restrictions on commercial speech are impermissible if regulatory alternatives that do not involve speech restrictions would be more effective in accomplishing the government's goals. See 517 U.S. at 507 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.); *id.* at 530 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ.). Here, however, the record shows that restricting broadcast advertising is a uniquely well-suited means of dealing with one of the central problems associated with casino gambling, the problem of compulsive gambling.

The record shows that it is difficult, if not impossible, for the government to prevent or discourage compulsive gambling through direct regulation of gambling activities. Raising the "price" of casino gambling through increased taxation or other regulatory means is unlikely to have a comparable impact on compulsive

gambling behavior, because one of the defining characteristics of compulsive gamblers is their willingness to continue gambling in the face of growing and ultimately ruinous financial losses. C.A. App. 401. Compulsive gambling also does not lend itself readily to direct restrictions on access, because persons suffering from compulsive gambling typically lack the outward physical symptoms associated with other forms of addiction. *Id.* at 335, 401. Nor can compulsive gambling be combatted successfully through educational programs or other kinds of affirmative government counter-speech: compulsive gamblers place themselves and others in jeopardy not because they are ignorant of the risks of gambling, but because they suffer from an impulse control disorder that prevents them from behaving rationally in the face of known risks. *Id.* at 181-184, 302.

In contrast, advertising restrictions like those found in Section 1304 hold out the promise of directly affecting compulsive gambling behavior. As noted at page 18 above, the record in this case indicates that broadcast advertising of casino gambling would directly contribute to compulsive gambling by reaching into the homes of current and potential compulsive gamblers and giving them immediate and repeated exposure to the sights and sounds of gambling, presented in especially attractive and persuasive ways. Prohibiting broadcast advertisements for casino gambling addresses the problem of compulsive gambling both at the "front end," by minimizing the exposure of susceptible individuals, and at the "back end," by eliminating an adverse influence on persons recovering from compulsive gambling. No non-speech regulatory alternative offers comparable benefits in terms of reducing the risks and costs of compulsive gambling.

Section 1304 is also a narrowly tailored means of advancing the federal government's interest in assisting non-gambling States. Because of the inherently interstate nature of broadcast signals, a more limited restriction on broadcast advertising would necessarily be less effective in insulating non-gambling States. And given the interstate character of broadcast transmissions in general, it is irrelevant to the constitutionality of Section 1304 that the signals of particular stations might not cross state lines. See *Edge*, 509 U.S. at 430 (Under the fourth component of the *Central Hudson* test, "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case.").

2. For the foregoing reasons, the district court in this case and the Ninth Circuit in *Valley Broadcasting* erred in holding that Section 1304 violates the First Amendment as applied to advertising for lawful casino gambling. In contrast, the Fifth Circuit reached the correct result in *Greater New Orleans* when it rejected the same First Amendment challenge to Section 1304.

Because the circuits are divided over the constitutionality of Section 1304, and because the scope of the federal government's authority to regulate broadcast gambling advertising is a matter of substantial public importance, review of the constitutional question by this Court is warranted. This Court has two petitions before it that present that question: this petition and the petition filed by the television and radio station plaintiffs in *Greater New Orleans*.

As we explain in detail in our opposition to the petition in *Greater New Orleans*, the limited evidentiary record in that case makes it an unsuitable vehicle

for this Court to resolve the constitutionality of Section 1304.[3] See Br. in Opp. at 16-20 in No. 98-387 (explaining that the principle that courts should not decide constitutional questions without a factual record adequate to illuminate the constitutional issues counsels against review in that case). In contrast, the evidentiary record in this case was developed after *44 Liquormart* and the Court's other intervening commercial speech decisions and was prepared in direct response to those decisions. This case contains a substantially more illuminating record than *Greater New Orleans* regarding how Section 1304 works and what it accomplishes. Accordingly, this case is more appropriate than *Greater New Orleans* as a vehicle for this Court to take up the constitutionality of Section 1304.

As noted above, the government's appeal in this case is currently pending before the Third Circuit, where the appeal has been fully briefed and is awaiting oral argument. In ordinary circumstances, the government would not suggest that the Court issue a writ of certiorari prior to judgment in a case like this one. Certiorari before judgment normally is reserved for cases in which a compelling need for immediate action by this Court outweighs the benefits to be obtained from the normal appellate process. See Sup. Ct. R. 11. Although resolution of the existing circuit split regarding the constitutionality of Section 1304 is desirable, the constitutional issue does not have the manifest urgency that led the Court to issue certiorari before judgment in cases such as *Mistretta* v. *United States*, 488 U.S. 361 (1989), and *United States* v. *Nixon*, 418 U.S. 683 (1974). Moreover, postponing review until after the Third

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[3] We are providing a copy of our brief in opposition in *Greater New Orleans* to respondents in this case.

Circuit has issued its decision would ensure that this Court receives "the benefit [of] permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984). Although two courts of appeals have addressed the constitutionality of Section 1304 already, neither court had the opportunity to evaluate the kind of evidentiary record that is before the Third Circuit in *Players*. See Br. in Opp. at 18-19 in *Greater New Orleans Broadcasting Ass'n.* v. *United States*, No. 98-387; Petition for a Writ of Certiorari at 11 & n.5 in *United States* v. *Valley Broadcasting Co.*, No. 97-1047. The Third Circuit's review of the record, and its evaluation of the First Amendment issue in the context of that record, can be expected to assist this Court in its own eventual deliberations. In our view, the preferable course would be for the Court to await the Third Circuit's resolution of this case before taking up the constitutionality of Section 1304.

Nevertheless, because of the pending petition in *Greater New Orleans*, this Court may choose to address the constitutionality of Section 1304 at the present time. In that event, the Court should grant certiorari before judgment in this case rather than, or at the very least in addition to, granting certiorari in *Greater New Orleans*. Doing so would ensure that the Court's review of the constitutional issue is not unnecessarily impeded by limitations in the record before this Court.[4]

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[4] On various occasions, the Court has granted certiorari prior to judgment in one case when another case before the Court presented the same or similar issues and the Court's resolution of those issues would benefit from concurrent review of the case pending in the court of appeals. See, *e.g.*, *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970); *McCullogh* v. *Sociedad Nacional*

CONCLUSION

The petition for a writ of certiorari before judgment should be granted if the Court concludes that it should undertake at this time to resolve the existing conflict among the courts of appeals on the question presented.

Respectfully submitted.

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de Marineros, 372 U.S. 10, 12 (1960); *McElroy* v. *Guagliardo*, 361 U.S. 281, 283 (1960); *Bolling* v. *Sharpe*, 347 U.S. 497, 498 (1954).

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 96-4911

PLAYERS INTERNATIONAL, INC., PLAYERS LAKE CHARLES, LLC, PLAYERS STAR PARTNERSHIP, SOUTHERN ILLINOIS RIVERBOAT/CASINO CRUISES, INC., NATIONAL ASSOCIATION OF BROADCASTERS, TEXAS ASSOCIATION OF BROADCASTERS, NEW JERSEY BROADCASTERS ASSOCIATION, MISSISSIPPI ASSOCIATION OF BROADCASTERS, LOUISIANA ASSOCIATION OF BROADCASTERS, MISSOURI BROADCASTERS ASSOCIATION, WEST VIRGINIA BROADCASTERS ASSOCIATION, MASSACHUSETTS BROADCASTERS ASSOCIATION, INC., NEW HAMPSHIRE ASSOCIATION OF BROADCASTERS, INC., ILLINOIS BROADCASTERS ASSOCIATION, H & D BROADCASTING LIMITED PARTNERSHIP, RARITAN VALLEY BROADCASTING CO., INC., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

AMENDED OPINION

[Filed: Dec. 19, 1997]

RODRIGUEZ, District Judge.

This matter is before the court on defendants' motion for summary judgment and plaintiffs' cross motion for summary judgment on Count I (alleging First Amendment violations) and Count II (alleging equal protection violations under the Fifth Amendment) of its complaint. Plaintiffs are a casino developer/operator and its wholly owned subsidiaries, a national association of broadcast licensees, nine state associations of broadcast licensees, and two licensees of broadcast radio stations who either seek to purchase radio and television advertisements for casino gambling or to sell such broadcast advertisements for casino gambling. They commenced this action against the United States and the Federal Communications Commission ("FCC") seeking to enjoin the government from enforcing 18 U.S.C. § 1304 and its corresponding FCC regulation 47 C.F.R. § 73.121.[1] Plaintiffs assert they want to purchase or sell advertising time concerning gaming activities by casino enterprises which fail to qualify under any of the listed exemptions to 47 C.F.R. § 73.1211, and contend that as a result of the FCC enforcement of U.S.C. § 1304 its members have been "deprived of advertising revenues and are losing business to other nonbroadcast competitors that are able to advertise non-Indian casino gaming." (Plfs.' Br. at 8).[2] Plaintiffs further believe that the

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[1] Because the language of 47 C.F.R. § 73.1211(a) is substantially identical to 18 U.S.C. § 1304, the bulk of this opinion will generally refer to § 1304.

[2] Presently plaintiffs are not being subjected to prosecution, however, because they have demonstrated a "reasonable threat of prosecution for conduct allegedly protected by the Constitution," they have standing to adjudicate this case. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 106 S. Ct.

FCCs enforcement of 1304 has "led to confusing and arbitrary set of unduly restrictive regulations" avowed to control the social harm caused by casino gambling (Plfs.' Br. at 3), but which are contravened by the "broad" exceptions which authorize the promotion of particular casino gaming activities, (Plfs.' Br. at 17). Finally, plaintiffs assert that the recent Supreme Court decision in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 134 L.Ed.2d 743 (1996), mandates a ruling in support of their position.

Grounding their arguments in legal and social history with respect to public participation in casino gambling, defendants contend that § 1304 and its corresponding regulation are constitutionally sound, and that *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 134 L.Ed.2d 711, does not impact on the constitutionality of the laws and regulations at issue. Defendants conclude that a finding in favor of plaintiffs would offend § 1304 by upsetting the goals which aim to discourage public participation in casino gambling advanced through § 1304's corresponding regulation.

I. LEGAL BACKGROUND

Title 18 U.S.C. § 1304 provides:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes

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2718, 91 L.Ed.2d 512 (1986); *see also Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997).

> drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined under this title or imprisoned not more than one year, or both.
>
> Each day's broadcasting shall constitute a separate offense.

The Federal Communications Commission ("FCC") is the federal agency authorized to enforce Title 18 U.S.C. § 1304. As such, it implemented regulation 47 C.F.R. § 73.121 which parallels 18 U.S.C. § 1304 thereby prohibiting broadcast advertising of any "lottery, gift enterprise, or similar scheme." The regulation states in pertinent part:

> (a) No license of an AM, FM, or television broadcast station, except as in paragraph (c) of this section, shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes.

47 C.F.R. § 73.121. The exceptions to this regulation read as follow:

> (c) The provisions of paragraphs (a) and (b) of this section shall not apply to an advertisement, list of prizes or other information concerning:
>
> (1) A lottery conducted by a State acting under the authority of State law which is broadcast by a radio or television station licensed to a location in

that State or any other State which conducts such a lottery. (18 U.S.C. 1307(a); 102 Stat. 3205).

(2) Fishing contests exempted under 18 U.S.Code 1305 (not conducted for profit, *ie.*, all receipts fully consumed in defraying the actual costs of operation).

(3) Any gaming conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)

(4) A lottery, gift enterprise or similar scheme, other than one described in paragraph (c)(1) of this section that is authorized or not otherwise prohibited by the State in which it is conducted and which is:

(I) Conducted by a not-for-profit organization or a governmental organization (18 U.S.C. 13079a); 102 Stat. 3205); or

(ii) Conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization. (18 U.S.C. 1307(a); 102 Stat. 3205).

47 C.F.R. § 73.1211.

Plaintiffs argue that the exceptions, particularly the Indian exception, have a detrimental economic impact on non-Indian casinos, and lack of "substantive difference between such activities [promoted via the exceptions] and the gaming activities conducted by non-Indian, commercially operated casinos." (Plfs.' Br. at 17-18). In contrast, defendants argue that the benefits provided to the exempted groups are supported by

legislative concerns for the groups' economy and self sufficiency. As for the Indian exception, defendants argue it "stems from the federal government's unique Constitutional and trust obligation toward the Indian tribes[,]" an obligation which is not applicable to the plaintiffs in this case. (Dfts.' Br. at 3).

II. STANDARD

Fed. R. Civ. P. 56(c) provides:

> [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The entry of summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if it is supported by evidence such that a reasonable jury could return a verdict in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A fact is "material" if, under the governing substantive law, a dispute about it might affect the outcome of the suit. *Id.* In determining whether a genuine issue of material fact exists, the court must view the facts and all reasonable inferences drawn from those facts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 316, 323, 106 S. Ct. 2548, 2552, 88 L.Ed.2d 265 (1986). Once the moving party has met its opening burden, the non-moving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. *Id.* at 324. The non-moving party may not rest upon the mere allegations or denials of its pleading. *Id.*; *Maidenbaum v. Bally's Park Place, Inc.*, 870 F. Supp. 1254, 1258 (D.N.J. 1994), *aff'd* 67 F.3d 291 (3d Cir. 1995). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial ." *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552.

However, in deciding the motion, the court does not "weigh the evidence and determine the truth of the matter, but [instead] determine[s] whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510. If the non-movant has provided evidence exceeding the "mere scintilla" threshold in demonstrating a genuine issue of material fact, the court cannot weigh the evidence and credit the movant's interpretation of the evidence. This is so even if the movant's evidence far outweighs the non-movant's evidence. Credibility determinations are the province of the fact finder. *Big Apple v. BMW of North America*, 974 F.2d 1358, 1363 (3d Cir. 1992), *cert. denied*, 507 U.S. 912, 113 S. Ct. 1262, 122 L.Ed.2d 659 (1993).

III. LAW AND ANALYSIS

A. Legislative Intent under 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211 of the FCC Rules

The government contends that § 1304, and its counterpart, § 73.1211 of the FCC's rules are constitutionally sound under both the First and Fifth Amendments. It rejects plaintiffs' allegation that neither § 1304 nor its legislative history express an intent to include casino gaming within the scope of its advertising prohibitions. The government states: "[S]ection 1304 is part of a body of federal restrictions on lotteries and related gambling schemes that has been maintained by Congress for well over 100 years ." (Dfts.' Br. at 4).

In *Federal Communications Com'n v. American Broadcasting Co.*, 347 U.S. 284, 74 S. Ct. 593, 98 L.Ed. 699 (1954), the Supreme Court found three essential elements of a "lottery, gift enterprise, or similar scheme": (1) the distribution of prizes; (2) according to chance; (3) for consideration. 347 U.S. at 289-91, 74 S. Ct. at 597. Here, plaintiff seeks to advertise non-Indian casino enterprises which provide games involving money betting as consideration for a chance to win a prize. Such games satisfy the three essential elements established under *Federal Communications Com'n*, and consequently, fall within the scope of § 1304 and the FCC's rules.

B. The First Amendment

In order to determine whether the statutory prohibitions on the broadcast advertising of casino gambling pursuant to § 1304 and the FCC's rules violate the First Amendment, the parties rely upon the Supreme Court's four-part inquiry enunciated in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*,

447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980). In Central Hudson, the Supreme Court held that a regulation of commercial speech is constitutional if the government shows:

> (1) the regulated speech accurately informs the public about the lawful activity, (2) the governmental interest behind the regulation is substantial, (3) the regulation directly advances the interest asserted, and (4) the regulation is no more extensive than necessary.

Id. As to the first prong of the *Central Hudson* test the government does not dispute that plaintiffs "intend to broadcast truthful advertising about lawful gambling activities." (Dfts.' Br. at 14). Therefore, the analysis begins with *Central Hudson*'s second step-whether the governmental interest behind the regulation is substantial.

1. Substantial Interest

The government's argument in support of *Central Hudson*'s second step is twofold. First, the government asserts that its interest in support of state anti-gambling policies became evident almost a century ago in *Champion v. Ames*, 188 U.S. 321, 23 S. Ct. 321, 47 L.Ed. 492 (1903). Accordingly, it argues that § 1304 and its corresponding regulations were implemented to help states "by disabling casino gambling and other forms of 'lottery, gift enterprise, or similar scheme' from reaching audiences in non-gambling states through broadcast advertising." (Dfts.' Br. at 15). Legislative history is provided by the government demonstrating Congress' rejection of attempts to legalize broadcasting of casino gambling ads. (*See, eg.*, Defense Exhibits A & D). In addition, the government notes "behind Section 1304 is

an independent interest in reducing participation in casino gambling and other forms of private commercial gambling, and thereby minimizing the social costs associated with those activities." (Dfts.' Br. at 17). Congressional findings and case law are offered in support of the propositions that gambling "contributes to corruption and the growth of organized crime" and "imposes a regressive tax on the poor..." (Dfts.' Br. at 18, n.9 & 10). Although the government recognizes that it lacks "unfettered discretion to choose between advertising restrictions and equally (or more) effective non-speech related regulations[,]" *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, it argues that generally the government has a substantial interest in reducing the social ills of casino gambling, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 106 S. Ct. 2968, 92 L.Ed.2d 266 (1986).

Plaintiffs recognize defendants' concerns over gambling, particularly compulsive gambling, however, they state "[s]uch concerns are not sufficient to warrant the federal regulation of gambling any more so than concerns about overeating would justify federal regulation of the purchase and sale of food." (Plfs.' Br. at 15). They conclude that the government failed to demonstrate "any causal connection between casino gaming and the social ills which the federal government seeks to prevent." *Id.*

(a)

The validity of the government's argument requires an examination of *Posadas*, 478 U.S. 328, 106 S. Ct. 2968, upon which they rely. In *Posadas*, the Supreme

Court analyzed Puerto Rico's Games of Chance Act of 1948 which

> [L]egalizes certain forms of casino gambling in licensed places in order to promote the development of tourism, but also provides that "[no] gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico." Implementing regulations prohibit the advertising of gambling parlors to the public in Puerto Rico but permit restricted advertising through publicity media outside of Puerto Rico.

478 U.S. at 328, 106 S. Ct. at 2970. Upon review of Puerto Rico's history, the Supreme Court recognized the island's longstanding attitude against casino gambling, an activity which was prohibited for approximately the first half of this century. 478 U.S. at 343, n. 8, 106 S. Ct. at 2978, n. 8. The Puerto Rican government firmly believed that advertising restrictions were necessary to reduce casino gambling participation by the island's residents. This interest was challenged by their desire to promote the island's economy which relies significantly on the tourism industry. 478 U.S. at 344, 106 S. Ct. at 2978. The legislation was created to promote tourism through casino advertising while restricting the flow of truthful information to its residents with the view that such restrictions would aid in reducing the social ills believed to be caused through gambling. Although the Supreme Court found that the legislation equated to restrictions on commercial speech, it found the legislation to be "no more extensive than necessary to serve the government's interest." *Id.* Consequently, the decision in Posadas found the challenged statute valid under *Central Hudson*: It was constitutional for the Puerto Rican government to restrict

commercial speech in an effort to protect its residents from casino gambling.

The government here claims that the portion of *Posadas* which discusses the second prong of the *Central Hudson* test should be read to confirm a general policy that governmental interest in minimizing the social ills of gambling, especially casino gambling, is a "substantial one." *Posadas*, 478 U.S. at 328, 106 S. Ct. at 2968. Its argument is based on the Supreme Court's conclusion in Posadas that Puerto Rico had a substantial interest in reducing the demand in casino gambling by its residents. That conclusion, however, was formulated as a consequence of the Court's review of the particular facts of that case together with Puerto Rican statutes and regulations restricting advertising of casino gambling aimed at residents of Puerto Rico. Within ten years of that decision, the court in *44 Liquormart* rejected *Posadas'* view of state discretion to suppress truthful, non misleading information for paternalistic purposes, and found that in rendering its decision it "erroneously performed the First Amendment analysis." *44 Liquormart*, 116 S. Ct. at 1511. The Court in *44 Liquormart* states:

> Given our longstanding hostility to commercial speech regulation of this type, Posadas clearly erred in concluding that it was "up to the legislature" to choose suppression over a less speech-restrictive policy. The Posadas majority's conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available . . . [I]nstead, in keeping with our prior holdings, we conclude that a state legislature does

> not have the broad discretion to suppress truthful nonmisleading information for paternalistic purposes that the Posadas majority was willing to tolerate.

Id. at 1511.[3] The Court in 44 *Liquormart* resisted Rhode Island's attempt to suppress truthful nonmisleading information for paternalistic purposes, and under First Amendment analysis questioned the right of any legislature, state or federal, to enact broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives are available.

Nevertheless, *44 Liquormart* does not reject the Supreme Court's finding that Puerto Rico has a substantial interest in reducing the demand in casino gambling by residents. 116 S. Ct. 1495. Arguably, on that basis the government's reliance on *Posadas*, 478 U.S. 328, 106 S. Ct. 2968, 92 L.Ed.2d 266, when considered together with additional information, provides support for its position that government intervention in reducing casino gaming will help minimize the social ills

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[3] In 1973 the Supreme Court found that commercial speech was entitled to First Amendment protection. *Bigelow v. Virginia*, 421 U.S. 809, 95 S. Ct. 2222, 44 L.Ed.2d 600 (1975). This holding, however, did not reverse its decision in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 93 S. Ct. 2553, 37 L.Ed.2d 669 (1973), wherein the Court ruled that First Amendment protection was not afforded to commercial speech about unlawful activities. Case law also dictates that a State may restrict commercial advertising which exert "undue influence" over consumers, *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L.Ed.2d 810 (1977), but regulations imposed by States completely banning all promotional advertising will trigger heightened First Amendment concerns, and therefore must be reviewed with "special care[,]." *44 Liquormart, Inc.*, 116 S. Ct. at 1504.

of gaming. Here, for example, the government submitted research regarding the psychological and pathological effect gambling has on the public; state studies focusing on the impact of casino gaming on crime; congressional hearings on national gambling impact and policy; newspaper articles on gambling addictions; and, findings made by the President's Commission on Organized Crime and Gambling-all of which do support its position that the government has a substantial interest in protecting the public by reducing participation in casino gaming.

However, the fact that *44 Liquormart* focuses on regulations of advertisements for alcoholic beverages does not preclude its applicability to other cases dealing with commercial speech. *See, e.g., Greater New Orleans Broadcasting Assoc., et. al. v. United States*, 69 F.3d 1296 (5th Cir. 1995), vacated, 117 S. Ct. 39, 136 L.Ed.2d 3 (1996) (remanded in light of *44 Liquormart*, Inc., 116 S. Ct. 1495).[4] Consequently, where anti-casino advertising regulations in effect touch on First Amendment

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[4] In *Greater New Orleans Broadcasting Assoc., et. al. v. United States*, 69 F.3d 1296 (5th Cir. 1995), *vacated*, 117 S. Ct. 39, 136 L.Ed.2d 3 (1996), a Broadcasters association sued the federal government and the FCC seeking declaratory and injunctive relief permitting them to broadcast advertisements for legal gambling in area casinos despite the federal restrictions set forth under 18 U.S.C.A. § 1304 and its corresponding regulations. The Court of Appeals found that the challenged statute constitutionally restricted commercial speech with respect to casino gambling advertising, and held that the statute directly advanced the government's interest in discouraging gambling, notwithstanding the restrictions on commercial speech, and the numerous exceptions. However, the Supreme Court vacated the opinion and instructed the Court of Appeals to further consider the case under *44 Liquormart, Inc.*, 116 S. Ct. 1495.

protections as a means for protecting its citizens from the social ills cultivated through casino gaming, the holding in 44 Liquormart must be considered.

Plaintiffs point to the "broad exceptions" to the broadcast advertising prohibition of § 1304, and assert two arguments. First, plaintiffs contend "[T]hese exceptions contravene, rather than promote, any asserted federal interest in supporting the policies of states that prohibit casino gaming." (Plfs.' Br. at 17). Secondly, plaintiffs maintain that there exists "no evidence" supporting the view that non-Indian gaming activities "create greater social or economic harm than other gaming activities conducted by Native Americans, states, charities, or governmental organizations, which are not subject to the federal casino advertising ban." (Plfs.' Br. at 18). They conclude "[T]he various statutory and regulatory exceptions to the federal casino advertising ban also undermine the credibility and substantiality of any asserted general welfare interest in discouraging public participation in lotteries or casino gaming." (Plfs.' Br. at 17).

Plaintiffs' argument, concerning the exceptions, mirrors a portion of the holding set forth by the Ninth Circuit in *Valley Broadcasting Co.*, 820 F. Supp. 519, aff'd. 107 F.3d 1328 (9th Cir. 1997). At the district court level the government argued that the interest in banning the advertising of casino gaming stemmed from its "desire to curtail the spread of organized crime and the social costs of legalized gambling." 820 F. Supp. at 525. In response the district court noted

> [T]o the extent casino gaming can be viewed as an attraction to elements of organized crime defendants offer no evidence that such elements are any more pervasive in casino gaming than in other

> forms of gaming for which no advertising limitations are enforced by the FCC.
>
> Similarly, the social costs associated with legalized gambling, while very real, are hardly limited to casino gambling. They are common to all forms of legalized gambling including state lotteries, Indian casinos, horse racing, and charitable gambling. *Id.*

Here, the government did not show how casino gaming occurring in anti-casino states pursuant to the exceptions is less likely to promote the social ills advanced by casino gaming regulated by the FCC. It is illogical to believe that non-FCC regulated gaming, including casino gaming, does not promote the same social ills caused by FCC regulated gaming. Congress, in creating the exceptions in § 1304 and its corresponding rules, did not suggest that Native Americans, charities, states or government organizations cause different social ills from those caused by regulated gaming.

(b)

The government advances federalism principles as its shield against the argument concerning the undermining effects created by the exceptions to § 1304, stating "Congress may legitimately employ the Commerce Clause to legislate against social ills, subject only to the requirement that the regulated activities affect interstate commerce[,]" (Dfts.' Br. at 20), and finds irrelevant that some states choose to encourage casino gambling, i.e. New Jersey and Louisiana, while others choose to encourage other forms of gambling covered by § 1304. The government concludes "Congress's [sic] assessment of federal interests cannot be trumped by a state's divergent assessment of its own interests[,] U.S.

Const., Art. VI, and Congress is therefore not obligated to defer to the social and economic policies of individual states." (Dfts.' Br. at 21).

States have a substantial interest in regulating the health, safety, and welfare of its citizens. Since anti-casino states cannot prevent broadcast signals from crossing interstate lines, the interstate broadcasts of gaming activities has caused Congress, under U.S. Const., Art. III § 8, to attempt to regulate the broadcasting of "advertisements of or information concerning any lottery, gift enterprise, or similar scheme." 18 U.S.C. § 1304. The federalism interest attempts to protect the choice of those states, which reject the broadcasting of gaming activities within their boarders. *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S. Ct. 2696, 125 L.Ed.2d 345 (1993). As such, the government does have an interest in exercising its commerce clause powers in a manner which protects a state's choice to prevent or promote the broadcasting of information regarding gambling. *See Valley Broadcasting Co.*, 107 F.3d 1328. Nevertheless, the holding in *44 Liquormart*, 116 S. Ct. 1495, alerts the courts that a government's substantial interest in protecting its citizens from certain social ills does not preclude a finding that a regulation infringes upon well-established constitutional principles. Neither a state nor the federal government may surrender constitutional rights, such as those embraced by the First Amendment, as a means of restricting participation in certain activities on the premise that such regulations constitutionally prohibit the conduct or activity they seek to control. Indeed, under *44 Liquormart* the Supreme Court recognizes a government's ability to regulate activities regarded as a "vice" or as the cause of certain

"social ills[,]" but it rejects those regulations imposing speech constraints, particularly where alternatives exist which satisfy the same needs and achieve the same end. *Id.*

> [W]e reject the assumption that words are necessarily less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily "greater" than the power to suppress speech about it . . . [T]he text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct . . . [T]he First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another mean that the government may use to achieve its ends.

116 S. Ct. at 1512.

Even where the evidence on record shows that a ban on advertising directly advances a government's substantial interest, the government must further demonstrate that the regulation it seeks to impose advances its interests to a "material degree[,]" and that the ban is no more extensive than necessary to serve the stated interest. *Id.* at 1499. Where a court finds that other forms of regulations exist which direct social conduct without surrendering society's First Amendment freedoms, the government has failed to establish a "reasonable fit" between its regulation affecting speech and its goal. *Id.* Accordingly, this court must turn to the third and fourth prongs of *Central Hudson*, in order to determine whether the government has shown that § 1304's advertising ban serves to significantly reduce the social ills fostered through gaming activities.

2. Does the Statute and Corresponding Regulation Advance the Interest Asserted or are Both More Extensive than Necessary to Serve that Interest?

The final two factors under *Central Hudson* "[i]nvolve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Rubin v. Coors Brewing Company*, 514 U.S. 476, 115 S. Ct. 1585, 131 L.Ed.2d 532 (1995). A regulation "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564, 100 S. Ct. at 2350. Moreover, regulations which "indirectly advance" a state interest should also be struck. *Id.* Hence, a court must carefully consider whether the "general application" of the statute directly advances the government's interests. *Valley Broadcasting Co.*, 107 F.3d 1328. The government bears the burden of showing that the challenged regulation advances its interest "in a direct and material way." *Edenfield v. Fane*, 507 U.S. 761, 767, 113 S. Ct. 1792, 1799, 123 L.Ed.2d 543 (1993). "[M]ere speculation and conjecture" does not satisfy the government's burden. 507 U.S. at 771, 113 S. Ct. at 1800. The Edenfeld Court explains "[a] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* In essence, the court must inquire whether the broadcasting restrictions implemented by § 1304 "will significantly reduce" public participation in gaming activities thereby enabling the government to advance its interest "to a material degree." *44 Liquormart*, 116 S. Ct. at 1499.

Here, the government argues that "[b]oth as a practical matter and as a legal one" anticasino states such as Maryland, Pennsylvania and Florida, need government assistance in order to protect their citizens from commercial speech regarding casino activity transcending their borders. (Dfts.' Br. at 22). It maintains that decreasing casino advertising will reduce the demand for gambling, which in turn enables them to protect states' policies regarding gambling. (Dfts.' Br. at 24). The government rejects the view that § 1304 constitutes a "blanket prohibition" on casino gambling advertising since it applies only to the broadcast media. By finding that § 1304 does not equate to a "complete" ban, the government finds it unnecessary to follow the holding in *44 Liquormart*, 116 S. Ct. 1495, which mandates consideration of the effectiveness of related alternatives.

According to the government § 1304 "goes no further than necessary" to protect states' policies against gambling and to discourage casino gambling participation. (Dfts.' Br. at 28-29). In effect § 1304 enables the government to insulate non-casino states from casino advertising without prohibiting advertising in those states permitting casino gambling. Thus, the government believes that § 1304 provides an effective means for handling problems associated with gambling, such as compulsive gambling, compared to other regulatory alternatives.

In contrast, plaintiffs assert that the government failed to meet its burden, that is, they failed to show the federal casino advertising ban "significantly advances the federal interest in favoring the policies of anti-gambling states or reduces the public demand for lawful casino gaming activities." (Plfs.' Br. at 19). Plaintiffs reject the government's attempts to distinguish the

commercial speech analysis in *44 Liquormart*, from the issues here, and assert that

> [R]ather than restricting commercial speech, the federal government alternatively could choose to regulate casino gaming directly, impose a direct tax on participation in casino gaming, implement an educational program to discourage public participation in casino gaming, or provide anti-gambling states with additional funding to support their efforts to discourage casino gaming.

(Plfs.' Br. at 24). Citing to *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S. Ct. 1585, 131 L.Ed.2d 532 (1995),[5] as support, they contend that because the regulatory scheme at issue "is replete with numerous exceptions and contradictory regulations" this court must find that it violates the First Amendment. (Plfs.' Br. at 19).

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[5] The Court in *Rubin v. Coors Brewing Co.*, was faced with the challenge of determining the constitutionality of a regulation which prohibited beer labels from displaying alcohol content. 514 U.S. 476, 115 S. Ct. 1585. Relying on *Posadas*, 478 U.S. 328, 341, 106 S. Ct. 2968, 2976, the government in *Rubin* justified the banning of truthful information claiming that the regulations protected citizens by preventing brewers from "competing on the basis of alcoholic strength, which could lead to greater alcoholism and its attendant social costs." 514 U.S. at 476, 115 S. Ct. at 1587. Similar to this case, the government in *Rubin* attempted to persuade the Court that the regulations served to decrease social problems, and it urged the Court to "turn to history as a guide." 514 U.S. at 487, 115 S. Ct. at 1592. However, the Court concluded:

> The failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the government's true aim is to suppress strength wars.

514 U.S. at 488, 115 S. Ct. at 1592.

Similarly, given the number of exceptions, "the Defendants cannot plausibly argue that the federal casino advertising ban effectively shields compulsive gamblers or anyone else from the 'atmosphere' of casino gaming." The defense "[i]mproperly assumes that a federal ban on commercial speech may be justified by a federal interest in assisting states in their efforts to suppress such speech." (Plfs.' Br. at 25).

The government suggests that restricting the ability to advertise gaming activities dissuades society from participating in such activities. It contends, therefore, that the restriction significantly advances its ability to both protect the interest of anti-casino states, and decrease the negative impact generated through gambling activities upon individuals, and consequently, society at large. Reason dictates that in today's society, television and radio advertising is perhaps the most lucrative means for promoting business activities. In addition, research supports the conclusion that gaming activity inevitably fosters social problems such as gambling addictions, and perhaps even violence. It, therefore, would seem reasonable to assume that the exceptions to § 1304 represent justified censorship of nonmisleading information which in turn satisfies the third prong of the *Central Hudson* test. However, upon closer review, the government's argument concerning its need to ban casino advertising to curtail the evils promoted through gambling activities is analogous to Rhode Island's view that censoring all advertisements that contain accurate and nonmisleading information about liquor sales advocates temperance and reduces consumption. Rhode Island sought to modify behavior through speech regulation. Section 1304 seeks to direct social behavior by banning truthful informa-

tion.[6] This court is informed by the reasoning and direction of *44 Liquormart*, 116 S. Ct. 1495. As a result, the government in this case must be subjected to the same level of scrutiny, recognizing, of course, that the speech prohibitions it seeks to promote usually do not survive constitutional analysis.

> [B]ans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms. Instead, such bans often serve only to obscure an "underlying governmental policy" that could be implemented without regulating speech.

44 Liquormart, 116 S. Ct. at 1508 (quoting *Central Hudson*, 447 U.S. at 566, n. 9, 100 S. Ct. at 2351, n. 9).[7]

Here, notwithstanding the articles and studies submitted, the government provides no evidentiary support beyond a mere assumption, that § 1304's commercial ban on gaming advertising will significantly reduce gambling addiction or violence. Also, of equal concern is the manner in which the underlying governmental policy, banning nonmisleading commercial messages about gaming activities from the public, is subverted by

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[6] Rhode Island's regulation was struck because the state failed to present any evidentiary support that its speech prohibitions served to significantly reduce the market-wide consumption of alcohol. *44 Liquormart*, 116 S. Ct. at 1509.

[7] The Court continues

> [P]recisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth.

44 Liquormart, 116 S .Ct. at 1508 (quoting *Linmark Assoc. Inc. v. Willingboro*, 431 U.S. 85, 96, 97 S. Ct. 1614, 1620, 52 L.Ed.2d 155 (1977)).

the exceptions to § 1304. The exceptions allow the same activities the government believes cause significant public harm. Even though there is merit for allowing certain groups, such as the Native Americans, to increase their revenues by allowing them to promote casino activities, it does not follow that a blanket prohibition against truthful, nonmisleading speech about the same lawful activity by non-Indian casinos is the only means by which the government can reduce the feared social ills caused by public participation in gaming activities. Therefore, in light of the alternatives that are possible, it is appropriate to hold that § 1304's blanket ban on truthful and non-misleading advertisements of gaming activities fails constitutional muster. This conclusion does not suggest that the government lacks a legitimate interest in assisting states in confronting the social problems which may inevitably develop. It means that the government may not promote legislation which infringes upon the First Amendment, as a means of suppressing conduct it permits, rather than finding ways to restrict the conduct.

By allowing the government to promote § 1304's advertising ban of truthful information this court would be enabling the government to advance a regulation which is more extensive than necessary to serve the government's interest in protecting non-casino states from the broadcasting of casino advertisements. Close analysis of the evidence on record further dictates that the numerous exceptions permitted by the regulations defeat the government's ability to successfully maintain that the challenged regulation directly advances the government's interests in protecting society from the social problems promoted through gaming activities. As a result, the government has failed to show that the

challenged regulation is in harmony with *44 Liquormart*, 116 S. Ct. 1495, and consequently, has failed to satisfy the last two requirements of the *Central Hudson* test.

IV. CONCLUSION

Accordingly, defendant's motion for summary judgment is denied, and plaintiff's cross-motion is granted. In addition, this court declares that the challenged statute and corresponding regulations are an unconstitutional infringement of plaintiffs' First Amendment rights.

An appropriate Order will be entered.

/s/ JOSEPH H. RODRIGUEZ
JOSEPH H. RODRIGUEZ
U.S.D.J.

Dated: December 19, 1997

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 96-4911

PLAYERS INTERNATIONAL, INC., ET AL., PLAINTIFFS

v.

UNITED STATES, ET AL.

[Filed: Dec. 19 1997]

AMENDED ORDER

Before: HON. JOSEPH H. RODRIQUEZ

For the reason set forth in the court's opinion filed even date,

IT IS on this 19th day of December, 1997 ORDERED that defendant's motion for Summary Judgement is **DENIED**;

and

IT IS FURTHER ORDERED that plaintiffs' cross - motion for Summary Judgment is **GRANTED** and

IT IS FURTHER ORDERED that Title 18 U.S.C. Section 1304 and its companion regulation, 47 C.F.R.

Section 73.12, unconstitutionally infringe upon plaintiffs' First Amendment rights.

/s/ JOSEPH H. RODRIGUEZ
JOSEPH H. RODRIGUEZ
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 96-CV-4911 (IHR)

PLAYERS INTERNATIONAL, INC., ET AL., PLAINTIFFS

v.

UNITED STATES, ET AL.

ORDER

On December 19, 1997, this court in *Players International v. U.S.*—F.Supp.—, 1997 WL 780942 (D.N.J., Dec. 19, 1997), declared Title 18 U.S.C. § 1304, and its corresponding regulation 47 C.F.R. § 73.121 unconstitutional. Shortly after this declaratory judgment was issued, the government announced that it would not enforce the regulation in New Jersey, thus rendering a direct opinion with respect to an injunction moot. On March 31, 1998, an Order to Show cause was heard before this court in which plaintiffs petitioned for a nationwide injunction enjoining the government from enforcing 18 U.S.C.§ 1304, and consequently, 47 C.F.R.§ 73.121. Plaintiffs contend that absent a nationwide injunction they are prevented from exercising the First Amendment rights recently outlined by this court.[1]

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[1] At the time the Order to Show Cause was scheduled, and the briefs submitted, the Supreme Court had yet to issue its decision

I. Statutory Authority

Fed. R.Civ. P. 65(d) provides:

> Every order granting an injunction and every restraining order shall set forth the reasons for this issuance; shall be specific in terms; shall describe it reasonable detail, and not by reference to the complaint or the document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

II. Argument and Analysis

Absent a nationwide injunction plaintiffs contend that they are prevented from exercising the First Amendment rights recently outlined by this court.[2] This belief is based in part on the FCC's public announcement that it will continue vigorously enforce 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211.[3] The gov-

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to deny review of the Ninth Circuit holding in *Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997).

[2] In a signed declaration, Catherine A. Walker, vice-president and General Manager of Players Lake Charles, states that "[b]ecause of continued threat of enforcement. . . Players Lake Charles has been unable to purchase advertising time for the purpose of advertising Players Lake Charles' commercial casino gaming operations, located in Lake Charles, Louisiana."

[3] The FCC public announcement states in part:

> After consultation with the Department of Justice, the Commission has decided, consistent with its response to a similar case in the Ninth Circuit, *Valley Broadcasting v. United States*, 107 F.3d 1328 (9th Cir. 1997), that it will not enforce the ban on the broadcast of lottery information

ernment rejects this contention stating that it has voluntarily suspended its enforcement of this regulation in the District of New Jersey pending appellate review. Similarly, the government suspended enforcement within the geographical jurisdiction of the Ninth Circuit review of *Valley Broadcasting*. The government asserts that because the constitutionality of section 1304 is being litigated in various courts throughout the country it would be "inappropriate" for this court to issue a nationwide injunction. (Dft's Br. At 2). It is its position that the "prudent course is to allow ongoing litigation to continue its course, with the expectation that the Supreme Court will ultimately determine the statute's constitutionally."

The parties do not dispute that within New Jersey this court has personal jurisdiction over the FCC. Morever, personal jurisdiction is not effaced simply by a party leaving the state in which it was enjoined from undertaking certain actions. *See Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932). The question remains, however, whether this court is empowered with the authority to enjoin the FCC outside of New Jersey. The issue is not easily resolved.

A court's power to issue injunctive relief is well settled, *United States v. United Mine Workers*, 330 U.S. 258 (1947), and the mandate of an injunction issued by a federal district court runs nationwide, *Leman*, 284 U.S. at 451-3. In addition to the court's power to bind the parties to the original action lies the authority to

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against stations licensed to communities in New Jersey. . . [W]e caution broadcaster that they should ensure that the broadcast of information regarding lotteries is not prohibited or otherwise restricted by New Jersey state law.

also bind non-parties who act with the enjoined party. Fed. R.Civ. P.65; *Ex Party Lennon*, 166 U.S. 548, 554 (1897) ("[T]he fact that petitioner was not a party to such suit, nor served with process or subpoena, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial so long as it was made to appear that he had notice of the issuing of an injunction by the court.") *accord Waffenschmidt v. Mackay*, 763 F.2d 711 (1985); *McGraw-Edison Co. v. Preformed Line Products co.*, 362 F.2d 339 (9th Cir. 1996); *Alemite MFG. Corp v. Staff*, 42 F.2d 832 (2d Cir. 1930). Nevertheless, the courts may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law. *Chase National Bank v. Norwalk*, 291 U.S. 431 (1934). Simply stated, "a courts" powers are limited to those over whom it gets personal service, and who therefore can have their day in court." *Alemire Mfg. Corp.*, 42 F.2d 711 (1985)(citing *Ex parte Lennon*, 166 U.S. at 555). Moreover, plaintiffs understand that the Declaratory Judgment Act, 28 U.S.C. § 2202, "expressly empowers" this court to grant nationwide injunctive relief. The Act specifically provides that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted . . . against any adverse party whose rights have been determined by such judgment[,]" consequently, plaintiffs propose the injunctive relief falls within the meaning of the Act. Notably, a declaratory judgment can be used as predicate to further relief, including an injunction. *Powell v. McCormack*, 395 U.S. 486 (1969); *Doe v. Gallinot*, 657 F.2d 1017 (9th Cir. 1981) (Upon declaring involuntary

commitment scheme unconstitutional on its face, district court was empowered to grant further necessary or proper relief, and since challenged provisions were not unconstitutional as to involuntary detainee alone, but as to any to whom they might be applied, it was not an abuse of discretion to enjoin officials and employees of California State Department of Mental health from applying the scheme.).

The government, unlike private litigants, is often involved in defending matters of constitutional dimension, involving legal questions of substantial public importance. Consequently, when our courts have reviewed cases involving the government as a party to a suit, the courts have been hesitant to issue a rule which would thwart the development of important questions of law by "freezing the first final decision rendered on a particular legal issue[.]" *United States v. Mendoza*, 464 U.S. 154 (1984). In fact, in cases involving important questions of substantial public importance the Supreme Court has emphasized the benefit it receives from permitting several courts of appeals to explore a difficult question before granting certiorari. *Id.* at 160 (citations omitted). For example, although the Supreme Court has ruled in favor of applying doctrines of res judicata and collateral estoppel against the government, *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1983), it recognized that absent mutuality a court should not freeze the development of laws, *Mendoza*, 464 U.S. at 155.

A review of Supreme Court decisions evidences its inclination to allow several court of appeals to explore a difficult legal issue. *See eg., Regions Hospital v. Shalala*, 1998 WL 71823; *Hudson v. United States*, 118 S. Ct. 488 (1997); *Salinas v. United States*, 118 S. Ct.

469 (19997); *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977); *California v. Yamasaki*, 442 U.S. 682 (1979). This inclination is also evidenced in matters involving administrative agency action where there is a conflict in practice between circuits. *See, eg. Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9 (1945). Such a dispute does not exists among the circuits with regards to the regulation at issue before this court. The potential for conflicting views was delayed by the Supreme Court's decision to vacate *Greater New Orleans Broadcasting Assoc., et al.v. United States*, 69 F.3d 1296 (5th Cir. 1995), in light of *44 Liquormart Inc., v. Rhode Island* 116 S. Ct. 1495 (1996).

The recent decision to deny review of the Ninth Circuit in *United States v. Valley Broadcasting* together with its decision to vacate the Fifth Circuit decision engenders the assumption that the decision rendered by the Ninth Circuit, and subsequently by this court, are enforceable as against the FCC. Indeed, if the plaintiffs herein were litigating the same matters in other jurisdictions, they would be victimized by burdensome re-litigation, which is contrary to the courts' on-going promotion of judicial economy. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). Presumably, if the parties to this suit were private, then an injunctive order would be appropriate, and a violation thereto would be cognizable in this court regardless of where a violation occurs. *Accord Heyman v. Kline*, 444 F.2d 65 (2d Cir. 1971).

III. Conclusion

In light of the issues raised and the arguments made, it is on this 1st day of April 1998, **ORDERED**:

That the decision that Title 18 U.S.C. Section 1304 and its companion regulation, 47 C.F.R. Section 73.12, unconstitutional infringe upon plaintiffs' First Amendment rights is final, and ripe for appeal to the Third Circuit. The issue of an injunction was rendered moot when the government agreed not to enforce the statute and its corresponding regulation in New Jersey; and

That the decision holding Title 18 U.S.C. Section 1304 and 47 C.F.R. Section 73.12 unconstitutional in effect enjoins the Federal Communications Commission from enforcing this regulation within the district court's jurisdiction against plaintiffs or any person similarly situated;

That because this legal action involves a question of substantial public importance, the request for a national injunction is **DENIED**; and further,

That in finding the statute and its corresponding regulation unconstitutional, any request for a stay would be inappropriate. The government has not raised sufficient justification necessary to a stay under the circumstances of this case. *See Atl Coast Demolition v. Bd. Of Chosen Freeholders*, 112 F.3d 652 (3d Cir. 1997).

/s/ JOSEPH H. RODRIGUEZ
JOSEPH H. RODRIGUEZ
U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 96-4911

PLAYERS INTERNATIONAL, INC., PLAYERS LAKE CHARLES, LLC, PLAYERS STAR PARTNERSHIP, SOUTHERN ILLINOIS RIVERBOAT/CASINO CRUISES, INC., NATIONAL ASSOCIATION OF BROADCASTERS, TEXAS ASSOCIATION OF BROADCASTERS, NEW JERSEY BROADCASTERS ASSOCIATION, MISSISSIPPI ASSOCIATION OF BROADCASTERS, LOUISIANA ASSOCIATION OF BROADCASTERS, MISSOURI BROADCASTERS ASSOCIATION, WEST VIRGINIA BROADCASTERS ASSOCIATION, MASSACHUSETTS BROADCASTERS ASSOCIATION, INC., NEW HAMPSHIRE ASSOCIATION OF BROADCASTERS, INC., ILLINOIS BROADCASTERS ASSOCIATION, H & D BROADCASTING LIMITED PARTNERSHIP, RARITAN VALLEY BROADCASTING CO., INC., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

NOTICE OF APPEAL

Before: HON. JOSEPH H. RODRIGUEZ

NOTICE is hereby give that defendants, United States of America an the Federal Communications Commission, appeal to the United States Court of

Appeal for the Third Circuit from the following orders entered in this action: (1) the Order, dated December 16, 1997, declaring 18 U.S.C. § 1304 and 47 C.F.R. § 73.12 unconstitutional, and (2) the Amended Order, dated December 19, 1997, granting plaintiffs' cross-motion for summary judgment, denying defendants' motion for summary judgment, and declaring 18 U.S.C. § 1304 and 47 C.F.R. § 73.12 unconstitutional.

Dated: February 13, 1998

Respectfully submitted,

FRANK W. HUNGER
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 96-4911

PLAYERS INTERNATIONAL, INC., PLAYERS LAKE CHARLES, LLC, PLAYERS STAR PARTNERSHIP, SOUTHERN ILLINOIS RIVERBOAT/CASINO CRUISES, INC., NATIONAL ASSOCIATION OF BROADCASTERS, TEXAS ASSOCIATION OF BROADCASTERS, NEW JERSEY BROADCASTERS ASSOCIATION, MISSISSIPPI ASSOCIATION OF BROADCASTERS, LOUISIANA ASSOCIATION OF BROADCASTERS, MISSOURI BROADCASTERS ASSOCIATION, WEST VIRGINIA BROADCASTERS ASSOCIATION, MASSACHUSETTS BROADCASTERS ASSOCIATION, INC., NEW HAMPSHIRE ASSOCIATION OF BROADCASTERS, INC., ILLINOIS BROADCASTERS ASSOCIATION, H & D BROADCASTING LIMITED PARTNERSHIP, RARITAN VALLEY BROADCASTING CO., INC., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

NOTICE OF APPEAL

Before: HON. JOSEPH H. RODRIGUEZ

NOTICE is hereby give that defendants, United States of America an the Federal Communications Commission, appeal to the United States Court of Appeal for the Third Circuit from the following orders

entered in this action: (1) the Order of the district court, dated April 1, 1998, and (2) the Order of December 19, 1998 referenced in the April 1st Order..

Dated: April 24, 1998

Respectfully submitted,

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Supreme Court, U.S.
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No. 98-721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

PLAYERS INTERNATIONAL, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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November 25, 1998

4 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-721

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

PLAYERS INTERNATIONAL, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Respondent Players International, Inc. is a publicly traded corporation, with wholly owned subsidiaries. The following Respondents are wholly owned subsidiaries of Players International, Inc.: Players Lake Charles, LLC; Players Star Partnership; Southern Illinois Riverboat/Casino Cruises, Inc.

STATEMENT

Contrary to Petitioners' assertion, Respondents do not contend "that the application of Section 1304 to broadcast advertising for lawful commercial casino gambling in States that permit such gambling violates the First Amendment under the commercial speech doctrine . . . ." Pet. at 8. Instead,

Respondents assert that Section 1304 abridges their First Amendment rights to broadcast truthful, non-misleading advertisements for lawful, commercial casino gaming in any State of the United States. Respondents are not otherwise dissatisfied with Petitioners' statements pursuant to Supreme Court Rules 24.1(a), (b), (d), (e), (f) or (g).

ARGUMENT

In two filings before the Court, Petitioners request that the Court deny certiorari in *Greater New Orleans Broadcasting Ass'n v. United States*, No. 98-387, and await the Third Circuit's forthcoming decision in this case before deciding the constitutionality of 18 U.S.C. § 1304. If the Court chooses to exercise certiorari jurisdiction over *Greater New Orleans Broadcasting Ass'n v. United States*, No. 98-387, at this time, then the Court should do likewise in this case and should dispose of both matters on a consolidated basis. Consideration of both cases will present the best opportunity to resolve Section 1304's constitutionality on the strength or weakness of divergent factual records. Consolidation also will comport with this Court's past exercises of certiorari before judgment.

Respondents agree that the Circuits' divergent views on Section 1304's constitutionality are appropriate for this Court's review. *See* Pet. at 12. By consolidating both cases, this Court will have before it two, very different decisions. One upholds the statute; the other invalidates it. One finds the evidentiary record largely irrelevant; the other finds it wholly insufficient. The *Greater New Orleans Broadcasting* petitioners argue that Section 1304's constitutionality is a doctrinal issue that the Fifth Circuit decided incorrectly. *See* Pet. in No. 98-387, at 11-18; Reply in No. 98-387, at 1-2 & n.1. The respondents there, Petitioners here, argue that the *Players* record best illuminates the constitutional issue. *See* Br. in Opp. in 98-387, at 18; Pet. at 12-13.

Considered together, these two cases afford an opportunity for the Court to resolve Section 1304's constitutionality, while

clarifying the government's evidentiary burden in the commercial speech analysis. Respondents concur with the *Greater New Orleans Broadcasting* petitioners that their case was decided incorrectly. Petitioners here presented no evidence in that case sufficient to sustain Section 1304. *See* Pet. at 22-23; Br. in Opp. in No. 98-387, at 9-10 & 18-19. If the Court were to exercise certiorari and agree, then its consideration of *Players* becomes critical to determining whether the government's "more illuminating record," Pet. at 13, can support Section 1304 in light of *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

Consolidation also will comport with past instances in which this Court has exercised certiorari before judgment when presented with multiple cases involving the same issues. *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970); *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 12 (1963); *McElroy v. United States*, 361 U.S. 281, 282-83 (1960). In these cases, the Court exercised certiorari before judgment to consolidate one case with another case, pending before the Court, that presented a similar or identical question of constitutional importance. Issuing certiorari and consolidating both cases therefore will be consistent with the Court's past practices.

CONCLUSION

If the Court chooses to resolve the constitutionality of 18 U.S.C. § 1304 at this time, the petitions for a writ of certiorari in this case and in *Greater New Orleans Broadcasting Ass'n v. United States*, No. 98-387, should be granted and those cases should be consolidated.

Respectfully submitted,

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MOTION FILED
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No. 98-721

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

PLAYERS INTERNATIONAL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE VALLEY BROADCASTING COMPANY AND SIERRA BROADCASTING COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI BEFORE JUDGMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-721

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

PLAYERS INTERNATIONAL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Valley Broadcasting Company ("Valley") and Sierra Broadcasting Company ("Sierra"), by undersigned counsel, hereby move the Court for leave to file an amicus curiae brief in the above captioned proceeding. In support thereof the following is shown.

Petitioner United States has consented to the filing of an amicus curiae brief by Valley and Sierra in this proceeding but respondent Players International, Inc., et al., has withheld consent.

Valley and Sierra are interested parties in this case and the Court should grant leave for them to file a brief as amici curiae. Valley and Sierra are broadcasters who are the licensees of television stations KVBC-TV, Las Vegas, Nevada, and KRNV-TV, Reno, Nevada, respectively, and were the plaintiffs in the case of *Valley Broadcasting Company v. United States,* 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 Sup. Ct. 1050 (1998). In *Valley* the 9th Circuit held that 18 U.S.C. Sec. 1304, as amended, which prohibits the broadcast of advertising for commercial casino gambling, violates the First Amendment. In *Greater New Orleans Broadcasting Association, Inc. v. United States,* 149 F.3d 334 (5th Cir. 1998), petition for certiorari filed September 2, 1998, No. 98-387, the 5th Circuit considered the same question and reached a contrary result, upholding the constitutionality of 18 U.S.C. Sec. 1304, as amended, and holding that the Government may prohibit the broadcast of advertising for commercial casino gambling. Thus there is a conflict between the circuits in *Valley* and *Greater New Orleans* which presumably will have to be resolved by this Court at some point.

By its petition for certiorari before judgment in this case, *Players International, Inc. v. United States,* 988 F. Supp. 497 (D. NJ 1998), the Government seeks to bypass the 3rd Circuit Court of Appeals and have this Court resolve the constitutional conflict between *Valley* and *Greater New Orleans* in *Players.*

Certiorari having been denied in *Valley,* that decision is now final, and Valley and Sierra, as well as all other broadcasters in the 9th Circuit, are now free to carry advertising for commercial casino gambling.[1] The only

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[1] Following the district court decision in *Valley,* the FCC on June 2, 1993, issued a Public Notice (DA 93-626) that it would not enforce the federal ban on commercial casino advertising against broadcasters in the State of Nevada only, and following the 9th Circuit decision upholding the district court ruling, the FCC on

way the outcome of the *Valley* case now can be reversed is by this Court's reaching a contrary result on the constitutional question decided there in either *Greater New Orleans* or *Players*. Thus Valley and Sierra have a clear interest in this Court's consideration of the constitutional question first raised in *Valley*, and in the question whether the Court should grant certiorari before judgment and consider that question in the *Players* case.

WHEREFORE, the premises considered, the Court is respectfully requested to grant leave to Valley and Sierra to file the attached brief as amici curiae.

Respectfully submitted,

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September 17, 1997, issued a Public Notice (DA 97-2014) that it would not enforce the ban against broadcasters in the 9th Circuit only. (A comparable Public Notice applying only to broadcasters in the State of New Jersey was issued by the Commission following the decision by the district court in *Players*. See Petition, p. 11.)

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IN THE

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OCTOBER TERM, 1998

No. 98-721

UNITED STATES OF AMERICA, *et al.*,
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PLAYERS INTERNATIONAL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Third Circuit

---

BRIEF OF AMICI CURIAE VALLEY BROADCASTING COMPANY AND SIERRA BROADCASTING COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI BEFORE JUDGMENT

STATEMENT OF INTEREST

As indicated in the Motion for Leave to File Amicus Curiae Brief bound herewith, Amici Curiae [1] were the

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[1] This brief was authored by counsel for *amici curiae* and no person or entity other than *amici curiae* made a monetary contribution to the preparation and submission of this brief.

plaintiffs in the case of *Valley Broadcasting Company v. United States,* 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 Sup. Ct. 1050 (1998), one of the three cases in which courts below have split on the question whether 18 U.S.C. Sec. 1304, as amended, which prohibits the broadcast of advertising for commercial casino gambling, violates the First Amendment. In *Valley* the 9th Circuit held the statute unconstitutional, as did the District Court of New Jersey in this case, *Players International, Inc. v. United States,* 988 F. Supp. 497 (D. NJ 1998), whereas in *Greater New Orleans Broadcasting Association, Inc. v. United States,* 149 F.3d 334 (5th Cir. 1998), petition for certiorari filed September 2, 1998, No. 98-387, the 5th Circuit upheld the constitutionality of the statute. Since effectively *Valley* will be reversed if this Court upholds the constitutionality of 18 U.S.C. Sec. 1304, as amended, in either *Greater New Orleans* or *Players,* Amici Curiae are interested parties, both on the merits and on the question whether the Court should grant certiorari before judgment in *Players.*

REASONS THE PETITION SHOULD BE DENIED

I. THERE IS NO BASIS UNDER RULE 11 FOR GRANTING CERTIORARI BEFORE JUDGMENT HERE.

Rule 11 of this Court's Rules states that a petition for certiorari before judgment in a court of appeals will be granted only upon a showing that the case is "of such imperative public importance" as to justify deviation from normal appellate practice and to require immediate determination in this Court. In its petition the Government does not even claim that this standard is met in this case, in fact it virtually concedes that the standard is not met. See Petition, p. 23.

This case is plainly not of such imperative public importance as to justify the extraordinary procedure pro-

posed by the Government here. As indicated in footnote 1 of the Motion for Leave to File Amicus Curiae Brief submitted herewith, Amici Curiae and the other broadcasters in Nevada have been carrying advertising for commercial casino gambling now for over 5 years, and such ads have been permitted in all of the 9th Circuit for over a year, without any noticeable reaction on the part of the public in any of those jurisdictions. Of course, one reason why the public may not consider the airing of these ads to be a matter of any particular importance may be that the same kind of ads for Indian casino gambling have been carried by broadcasters all over the country for the last ten years. Under the circumstances it is understandable that the public may simply consider that a casino gambling ad is a casino gambling ad, without regard to whether the party operating the casino is an Indian tribe, or a commercial licensee of a state, or a governmental entity, or a non-profit organization. In any event, the question at issue in this case is not one which has attracted very much public attention or interest.

Moreover, it should be noted that heretofore the Government has not been in any hurry to have the Court address this question of the constitutionality of 18 U.S.C. Sec. 1304, as amended. Although the 9th Circuit ruled in *Valley* that the statute violated the First Amendment, the Government did not raise the constitutional question in its petition for certiorari in that case last term. See Petition for a Writ of Certiorari in *United States v. Valley Broadcasting Co.*, No. 97-1047. How can the constitutional issue now be important enough to warrant review before judgment in this case, when last term it was not even important enough to warrant being raised in the *Valley* petition for certiorari?

II. THE EVIDENTIARY RECORD IS NOT A SUFFICIENT BASIS FOR CERTIORARI BEFORE JUDGMENT HERE.

The Government's only justification for its Petition for Certiorari Before Judgment is that the evidentiary record in this case is allegedly more extensive than the record in *Greater New Orleans*. Petition, pp. 13, 23. The evidentiary record in this case was developed after *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), says the Government, and is "more illuminating" than the record in *Greater New Orleans*. Petition, p. 23. Yet *Greater New Orleans* was remanded by this Court to the 5th Circuit specifically for reconsideration in light of *44 Liquormart*, on remand the Government was given an opportunity to supplement its earlier evidentiary submission, and the Government did so extensively, see *Greater New* Orleans, 149 F.3d at 338-339. Thus, the pertinent question would seem to be not which record is more extensive but whether the difference is of any significance to the resolution of the constitutional issue which is common to both cases.

The most noteworthy thing about the Government's now voluminous record evidence in both of these cases is that in each case the court below rejected that evidence as not being probative of the issues before the court. In this case the district court stated:

> Here, notwithstanding the articles and studies submitted, the government provides no evidentiary support beyond a mere assumption, that § 1304's commercial ban on gaming advertising will significantly reduce gambling addiction or violence.

988 F. Supp. at 506.

Likewise, in *Greater New Orleans*, although the divided 5th Circuit upheld the constitutionality of section 1304, as amended, the court stated, with respect to the Government's new evidence regarding compulsive gambling:

> The government's new argument suffers fatally, however, because none of its sources specifically connect casino gambling and compulsive gambling with broadcast advertising for casinos.

149 F.3d at 339.

In short, the Government is asking this Court to grant certiorari before judgment because its record is more extensive here than in *Greater New Orleans*, but in both cases the court below held that the Government's evidence was not probative of the issues. Surely, reviewing evidence which two courts have already found not to be probative is a job better left to the 3rd Circuit. Presumably this Court has better things to do with its time than that.

It should also be noted that this is not particularly a fact-driven case. Contrary to the implication of the Government's new evidence regarding compulsive gambling (see, e.g., footnotes 9-11 in *Greater New Orleans*, 149 F.3d at 338-339), the question at issue here is not whether there should be advertising of casino gambling over the air. For better or worse, that question was answered by the Congress in 1988 in the Indian Gaming Regulatory Act, 25 U.S.C. 2701, et seq., and the Charity Games Advertising Clarification Act, 18 U.S.C. 1307(a), where the Congress authorized broadcasters to carry ads for casino gambling run by Indian tribes, government entities, not-for-profit organizations, and commercial organizations as long as their gambling activities are occasional and ancillary to their principal business. The question at issue here is whether under the First Amendment the Congress can make a law authorizing broadcasters to carry commercial announcements for one group of advertisers and prohibit them from carrying the same commercial announcements for another group of advertisers, even though the ads for the second group are concededly truthful and about lawful activities. Whether the Government's record evi-

dence about compulsive gambling and the like is more extensive here or in *Greater New Orleans* is immaterial, because in the final analysis this case is not primarily about gambling, it is about speech.

III. THERE IS NO SUPPORT IN PRECEDENT FOR GRANTING CERTIORARI BEFORE JUDGMENT HERE.

The Government acknowledges that the constitutional issue in this case "does not have the manifest urgency" that led the Court to issue certiorari before judgment in cases such as *Mistretta v. United States*, 488 U.S. 361 (1989), and *United States v. Nixon*, 418 U.S. 683 (1974). (Petition, p. 23.) However, the Government goes on to argue, in its footnote 4 on pages 24-25 of its Petition, that on various occasions, the Court has granted certiorari prior to judgment in one case when another case before the Court "presented the same or similar issues and the Court's resolution of those issues would benefit from concurrent review of the case pending in the court of appeals." The Government cites four cases for this statement, but none of the cases cited supports such a broad reading of the Court's prior practice with respect to granting certiorari before judgment.

The first two cases cited, *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970), and *McCullough v. Sociedad Nacional de Marineros*, 372 U.S. 10, 12 (1960), were both situations where the district court case involved *the same transaction* as the circuit court case before this Court, and it was necessary for the Court to decide both cases in order to bring closure to the transaction. The third case, *McElroy v. Guagliardo*, 361 U.S. 281, 283 (1960), was one of four cases decided the same day presenting different questions under Article 2(11) of the Uniform Code of Military Justice, which provided for trial by court-martial of "all persons serving with, employed by, or accompanying the armed forces outside the

United States", concerning whether the statute could constitutionally be applied in peacetime. Although one of the cases was pending on appeal to a circuit court, the Court granted certiorari before judgment in that case in order to address all four cases under the statute at the same time. That action hardly supports a grant of certiorari before judgment here, where there is only one question at issue and there are already two circuit court decisions in conflict.

The fourth case cited by the Government, *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954) was a companion case to the case with perhaps the most "imperative public importance" of any decided by this Court in the twentieth century, *Brown v. Board of Education*, 347 U.S. 483 (1954), which prohibited the states from maintaining racially segregated public schools. *Bolling* raised the same issue and resulted in the same prohibition being applied to the District of Columbia. Needless to say, the grant of certiorari before judgment in *Bolling* is not a basis for such action in this case.

CONCLUSION

Under the Court's Rule 11 this case is not of such imperative public importance as to justify deviation from normal appellate practice, and under the Court's prior cases there is no basis for a grant of certiorari before judgment here. Accordingly, the Petition for Certiorari Before Judgment should be denied.

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December 1, 1998